United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-1278

To be argued by
GUY L. HEINEMANN
and
BARRY A. BOHRER

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 76-1278

B P/S

UNITED STATES OF AMERICA,

Appellee,

-against-

ROBERT L. VAN MEERBEKE and
DONALD M. JONES,

Defendants-Appellants.

On Appeal from the United States District Court
for the Eastern District of New York

JOINT REPLY BRIEF

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UNITED STATES COURT OF APPEALS
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UNITED STATES OF AMERICA, Appellee, -against- ROBERT L. VAN MEERBEKE and DONALD M. JONES, Defendants-Appellants.	Docket No. 76-1278

JOINT REPLY BRIEF

PRELIMINARY STATEMENT

Appellants Van Meerbeke and Jones submit this reply brief to answer and clarify specific arguments made in the Government's brief. Naturally, failure to reply to a particular matter in the Government's brief only means that the issue has been sufficiently addressed in appellants' respective principal briefs.

ARGUMENT

POINT I

THE MANNER IN WHICH THE DISTRICT COURT HANDLED THE OPIUM-EATING INCIDENT CONSTITUTED REVERSIBLE ERROR

The Government's brief incorrectly described the sequence of events regarding the opium-eating incident. On March 25, 1976, Fife, while on the witness stand, swallowed some opium and was observed by the Court and many jurors, but not by defense counsel or the Government.* The Court, incredibly, made no mention of the incident. On the following day of trial, March 29, 1976, one of defense counsel noticed Fife swallow something while sitting on the witness stand waiting to testify. Fife was then questioned about this on cross-examination. When Fife admitted having drugs in his system, defense counsel moved for a mistrial and to strike Fife's testimony. It was only during the argument at side-bar that the trial judge informed counsel, for the first time, that the Court had, in fact, previously witnessed Fife's swallowing opium some days before, but had said nothing ** (Tr. 370-372; 475)

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* In the papers submitted in support of the motion for a new trial, Fife stated that it was on this day (March 25, 1976) that he had been "constantly nibbling" and was "more wasted than the other day".

** The Government suggests that the Court did not know for certain that it was opium which Fife had placed in his mouth until four days later, when Fife stated that it was (Brief, page 13).

(Footnote continued on following page.)

In view of this sequence of events, the Court, clearly, was obligated to inquire into Fife's opium-eating habits, sua sponte, as soon as they were noticed.

The Government claims that Rule 601 of the Federal Rules of Evidence limits the court's discretion in insuring that a witness is not under the influence of drugs. There is simply nothing in the legislative history or the commentaries to suggest that the Rule was intended to effect such a change.

Furthermore, the Government grossly distorts appellants' arguments as to Fife's status as a witness. Appellants do not argue that Fife could never testify because he is a drug addict. Rather, it is submitted that Fife's ingestion of drugs throughout the better part of his appearance on the witness stand may well have affected his mental capacity to such an extent

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(Footnote continued from preceding page.)

** The record belies this contention. The trial judge, in fact, stated explicitly that "[T]his is a person who used a lot of drugs. It is true when the suitcase was in front of him he took a small snip, the Court saw him and the jury saw him. I didn't see him take any today." (Tr. 372) These remarks were made on Monday, March 29, 1976, and obviously referred to the opium-eating incident of Thursday, March 25, 1976, the previous day of trial.

that he should not have been permitted to testify at that time. If and when Fife was free of drugs in his system, naturally, he would be a legally competent witness.*

Certainly, if a witness were intoxicated, he would not be permitted to testify, until sober. See Hartford v. Palmer, 19 Johns. 143 (1819), which held that the trial court, in excluding a witness from testifying because of drunkeness, properly applied the rule which

> "... excludes persons from testifying, who are besotted with intoxication, at the time they are offered as witnesses; for it is a temporary derangement of the mind; and it is impossible for such men to have such a memory of events, of which they may have had a knowledge, as to be able to present them, fairly and faithfully, to those who are to decide upon contested facts." Hartford, supra, at 144. [Emphasis supplied.]

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* Fife was serving the remaining period of his sentence in a "half-way house" and thus had the opportunity to obtain other drugs. Fife seemed somewhat talented at insuring that drugs were always available. Even while incarcerated in the West Street Detention Center after arrest, he managed to secrete opium in a rubberized capsule and store it in his digestive tract for later use in West Street (Tr. 274-78).

It may be said that a drunken witness is more clearly noticeable than one who is under the influence of drugs. For this very reason, when there is evidence that the witness is under the influence of narcotics,

> "[w]hile his demeanor at trial may be a relevant factor, it is by no means the only one and it cannot obviate the need for a hearing on his competence. This reasoning applies with particular force to a defendant who may be under the influence of narcotics, since the symptoms and effects of an acute brain syndrome produced by narcotics will often not be apparent to a lay observer, even a judge, but only to an expert. Even then a careful examination would seem necessary to determine the extent to which the defendant's memory and other rational faculties have been impaired by the drugs." Hansford v. United States, 365 F.2d 920, 924 (D.C. Cir. 1966) (footnotes omitted).

Hansford followed Pate v. Robinson, 383 U.S. 375 (1966), which held that evidence raising a substantial doubt regarding a defendant's competency imposed a constitutional duty on the Court to conduct an inquiry into the matter. It is respectfully submitted that, as the District of Columbia Circuit has held in United States v. Crosby, 462 F.2d 1201 (D.C. Cir. 1972), this standard applies with equal force to witnesses who, during their testimony, are under the influence of narcotics. The

standard is particularly appropriate since a witness' capacity to testify may be affected by being under the influence of narcotics. Mack, Forensic Psychiatry and the Witness - A Survey, 7 Clev. Marsh L. Rev. 302, 309 (1958).

Accordingly, the Government cannot, with such a broad stroke, erase the logic of Crosby. Crosby, which applied the standard of Hansford, supra, to the issue of the competency of witnesses, would require a hearing to determine the competency of a witness when a "red flag" of material impact on a witness' competency is waved. Id., 462 F.2d at 1203. A more vivid "red flag" would be hard to conceive than the situation at bar, where the trial judge saw the Government's chief witness taking drugs and counsel did not. The Court's failure to bring this to counsels' attention is plain error and requires the reversal of the conviction.

POINT II

THE CONDUCT OF THE TRIAL JUDGE DEPRIVED APPELLANTS OF A FAIR TRIAL

The Government suggests that defense counsel acted improperly by attempting to make the trial judge

a witness, thus requiring the interjections by the judge (Brief, page 18). In particular, the Government claims that the cross-examination which led to the Court's interjections concerned "questions put to Fife ... about promises which the court might have made to Fife ..." (Brief, page 15).

A review of the record discloses that this contention is erroneous. All of the questions concerned the witness' credibility vis-a-vis promises made by the Government, without any suggestions about the Court's conduct. Nevertheless, the Court interrupted and contradicted counsel's opening remark that the witness had lied to the judge (Tr. 107-08). While the witness was being cross-examined, the Court continually gave its version and interpretation of the significance of a letter written by the witness to the Court, Thus, when the witness was asked if he represented to the Court in the letter that he had been promised he would be out in eight months, the Court interrupted and stated: "The answer to that is no" (Tr. 314-315). In fact, the letter did state:

> "The fact is that altho both Mr. Clayman and my lawyer assured me that I would be paroled in eight months, the board here never paroles drug cases with two year sentences." (Tr. 318-321; Def. Ex. H p. 3).

The effect of such interjections, by which the judge made himself a witness in violation of F. R. Ev. Rule 605, was devastating.

The contention of the defendants below was that Fife colored his testimony to procure a lighter sentence and other consideration* -- a perfectly proper argument, see United States v. Projansky, 465 F.2d 123, 136 (2d Cir. 1972). Literally every week in the district courts of this circuit the Government tries defendants based on accomplice testimony. Frequently, the accomplice at the time of his testimony, has been or is about to be sentenced by the same judge who presides over the trial at which his testimony is being heard.** Since this is so, letters to the sentencing judge by the accomplice witness are common, and can be important impeachment material at the trial. In this case, the matter in which the trial judge frequently interjected himself concerned the letter Fife had written directly to the judge pleading for a reduction of sentence -- which he subsequently

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* He testified that he was promised his girlfriend would not be prosecuted although she purportedly transmitted messages on the telephone (Tr. 295-97).

** E.g., Rule 3, Individual Assignment and Calendar Rules, U. S. District Court for the Eastern District of New York.

received (Def. Ex. H). Fife stated in the letter that his own lawyer and the Assistant U. S. Attorney had promised him that he would only serve eight months in jail. Long before appellants' trial, the judge himself was so concerned with this allegation of a promise of release in eight months that he had insisted that both government and defense counsel submit affidavits concerning their statements to Fife.* Since the judge himself was so concerned with the accuracy and credibility of these statements to take the unusual step of a special inquiry, it is easy to see how important defense counsel considered this letter for use on cross-examination. Accordingly, in view of the fact that Fife's credibility was the key issue below, the trial judge's injections concerning this letter were of such moment as to deprive the appellants of a fair trial.

The Government characterizes the trial judge's remarks as permissible under his "wide discretion in the conduct of the trial" (Brief, page 17). Significantly, however, while the judge repeatedly interjected himself

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* See Appellant Van Meerbeke's principal brief, p 16.

into the proceedings to give his opinion on the significance of materials being used to cross-examine Fife, the Court remained silent and failed to bring to counsel's attention the opium-eating incident of March 25, 1976. Indeed, the judge himself could give no viable reason for this omission. During the argument on the motion for a new trial, the Court stated the following concerning the first opium-eating incident:

> "it happened so fast I don't think there was any opportunity for anybody to say anything. Are you aware of that? He just grabbed it and put it in his mouth and that was it, it was gone ... . What chance did I have to say anything? (16a)"*

POINT III

THE ASSERTED ERRORS BELOW WERE NOT HARMLESS

The Government would have this Court believe that, in light of the entire case, any error regarding the opium-eating incident or the trial judge's conduct, was harmless. The Government, however, greatly exaggerates

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* Portions of the minutes of the argument on the motion for a new trial have been reproduced in appellants' Appendix.

the strength of its case.* Although there was proof of Fife's prior association with Van Meerbeke (conceded in appellants' opening statements), the primary proof of appellants' involvement in Fife's smuggling activity was Fife's testimony itself.** And Fife had been severely impeached, having admitted that he had previously lied under oath at the trial about the identity of his source of opium in India (Tr. 173; 339-47; 359; 510).*** It was also disclosed that

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* There can be little doubt that without Fife's testimony, a motion for an acquittal at the close of the Government's case would have been granted. Rule 29, F.R.Cr.P.

** As to Jones, his journey to JFK Airport from London on the same plane as Fife adds little to Fife's story that Jones was involved in the smuggling, particularly when Fife testified that Jones refused to take the baggage stub for the opium-filled suitcase, as supposedly planned. (Tr. 513). As to Van Meerbeke, the telegram (Gov't. Ex. 2) was as capable of an innocent interpretation as an incriminating one.

*** Despite Fife's recantation on this point, the Court failed to charge, as requested, that the jury "should weigh with caution and great care the testimony of an admitted perjurer". (Tr. 521 - 522) (Defendant's Request to Charge No. 11.)

Fife had concealed from the Government the fact that he was to profit $12,000 from the smuggling scheme (Tr. 241-42), and that he lied to the Government about prior narcotics trafficking (Tr. 243-46; 266-67). Additionally, the delicate balance which could be tipped either way only by the jury's careful evaluation of Fife's credibility, was unfairly jarred by the prosecutor's grossly improper comment on summation that both appellants had sold drugs to school children (Tr. 609,613-615). There was absolutely nothing in the record to support this argument.*

Summary

The defendants were convicted below on the testimony of a government witness known to have swallowed opium while on the witness stand both days he testified. Fife furthermore admitted being under the influence of the drug on both days, especially the first day when counsel were uninformed as to the incident.

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* The Court gave a curative instruction at the close of the Government's rebuttal, but denied appellants' motion for a mistrial (Tr. 613-615). On appeal, appellants do not contend that, standing alone, the prosecutor's comments constitute reversible error. However, the prejudicial comments are an additional factor in evaluating the contention that appellants were deprived of a fair trial. See United States v. Alphonso-Perez, 535 F.2d 1362, 1366 (2d. Cir. 1976).